IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

OTIS STEVENS, JR. INDIVIDUALLY, AND AS REPRESENTATIVE OF A CLASS OF PERSONS SIMILARLY SITUATED Plaintiff,	:	CIVIL ACTION
v.	:	
CITIGROUP, INC. CITICORP CITIMORTGAGE, INC., and DOES ONE THROUGH FIFTY Defendants.	:	NO. 00-3815

M E M O R A N D U M

Newcomer, S.J. December , 2000

I. BACKGROUND

The Court now considers defendants' Motion to Dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6), Motion to Dismiss All Class Allegations, and Motion for Award of Attorney's Fees and Costs. The Court recites the following facts based upon plaintiffs' Complaint, facts which this Court accepts as true for the purposes of its decision today.

Plaintiff Otis Stevens, Jr. ("Stevens") is a citizen of the Commonwealth of Pennsylvania, and resident of the Borough of Darby, Delaware County. Stevens is a mortgager of the defendants.

Defendant Citigroup, Inc. ("Citigroup") is a financial holding company and parent and sole shareholder of defendant Citicorp. Additionally, Citigroup allegedly exercises full

dominion and control over defendant Citimortgage, Inc., as well as Citicorp. As part of its "Citibanking North America" operation, Citigroup finances and services mortgages. Citigroup is a Delaware corporation with its principal place of business in New York.

Defendants Does are persons plaintiffs believe are involved in the scheme the Court now describes.

Plaintiff claims that defendants are liable for 1) violation of 12 U.S.C. § 2605, the Real Estate Settlement Procedures Act ("RESPA"); 2) breach of contract; 3) breaching its obligations of good faith and fair dealing; 4) unjust enrichment; 5) constructive fraud; 6) misrepresentation; 7) fraudulent misrepresentation; and 8) unfair trade practices.

To support those claims, plaintiff alleges that defendants failed and or refused to continue making payments for hazard insurance, chosen by its customers, from an escrow account established by Citigroup with mortgagor funds paid by the mortgagor. Instead, defendants purchased "Forced Order" hazard insurance financed and/or serviced by defendants at a higher cost, and higher commission for self benefit. Defendants allegedly purchased the forced order insurance even though the customer purchased policies were still in effect and current.

Plaintiff further contends that the mortgage instruments require that the mortgagor provide sufficient

insurance coverage, and defendants are only authorized to purchase reasonable forced placed coverage if the mortgagor fails to do so. Accordingly, plaintiff claims that defendants purchased forced placed coverage at excessive premium cost despite the availability of suitable, lower priced insurance, and even though it was aware of former or existing policies on the mortgaged properties. In return for these purchases, defendants obtained higher percentage commissions, and services, such as clerical work involved in tracking insurance coverage on all of defendants' mortgagors, from the insurers and their agents. These services were funded out of the proceeds of the forced order policies.

Additionally, when defendants' purportedly purchased the forced order insurance, they failed to first release the escrowed accounts to the customer placed insurer. They further failed to notify the mortgagor of the exact reason that it force placed the hazard insurance, and did not inform the insured that the existing insurance had been terminated or jeopardized because of defendants' failure to release the escrow to the mortgagor's carrier.

Plaintiff has filed its case on behalf of the following class: all of defendants' mortgagors who have been charged forced order insurance premiums in the United States during the six years preceding the filing of the Complaint in this action, and

who have not received a full refund.

Plaintiff alleges that defendants employed practices that coerced the class members into making forced order insurance payments. The plaintiff further claims that the class numbers in the tens of thousands and that there are substantial questions of law and fact common to the class. Plaintiff's Complaint also articulates seven questions of law and fact that are common to the class, while explaining that plaintiff's claims are typical of those belonging to the class. Plaintiff's Complaint asserts that the plaintiff would adequately and fairly represent the interests of the class, and argues that plaintiff's case is properly maintainable as a class action pursuant to Federal Rule of Civil Procedure 23(b).

With respect to defendants' actions directed toward Stevens, Stevens alleges the following: On January 31, 1986, plaintiff gave a mortgage to Residential Financial Corp. in return for a loan to purchase his residence at 442 Darby Terrace, Darby, Pa., 19023. On that same day, Residential Financial Corp. assigned the mortgage to Citicorp, with Citigroup as the mortgage servicer.

Paragraph four of the mortgage requires the mortgagor to maintain hazard insurance naming the mortgagee as a loss payee. Accordingly, plaintiff maintained his own purchased insurance, and defendants paid the hazard insurance premiums from

plaintiff's escrow from 1986 to 1991. The annual premium for this insurance ranged from $159.00 to $242.00.

Thereafter, on February 10, 1992, plaintiff filed for relief under 11 U.S.C. chapter 13. From the date plaintiff filed for bankruptcy, defendants ceased communication with plaintiff. Consequently, defendants did not notify plaintiff of changes in his current mortgage, mortgage requirements, any denial of acceptance of Stevens' mortgagor-purchased hazard insurance, and any other matter disaffecting plaintiff. Additionally, in 1992, defendants failed to make any payment on behalf of Stevens' to pay for his placed hazard insurance.

Beginning in 1993, defendants then began paying for force-placed, mortgagee purchased, hazard insurance ranging from $957.00 in 1994 to $1,779.00 in 1993. Defendants allegedly never advised plaintiff of its payment for such insurance, nor did it provide him with notice that it was no longer paying his purchased insurance from his account.

On July 28, 1997, defendants transferred and assigned its right, title and interest in Steven's mortgage to Union Planters Mortgage Corporation. However, defendants did not notify plaintiff of this transfer.

In light of the foregoing facts, the Court now considers defendants' motions.

II. DISCUSSION

A. Defendants' Motion to Dismiss

1. Legal Standard

When evaluating a Motion to Dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6), the Court must accept each allegation in a well pleaded complaint as true. See Albright v. Oliver, 510 U.S. 266, 268 (1994). Additionally, a Motion to Dismiss should only be granted if the Court finds that no proven set of facts would entitle the plaintiff to recovery under the filed pleadings. See Conley v. Gibson, 355 U.S. 41, 45-46 (1957). Finally, under a motion to dismiss pursuant to 12(b)(6), the defendant carries the burden of establishing that no claim has been presented. See Curry v. Huyett, NO. CIV.A. 93-6649, 1994 WL 111357, at *1 (E.D.Pa., Mar 30, 1994).

2. Plaintiff's Claims

Defendants first argue that all of plaintiff's claims, except his RESPA claim, are barred by the filed rate doctrine. Under the filed rate doctrine, where regulated companies are required by federal or state law to file proposed rates or charges with a regulatory agency, any rate approved by the agency "is per se reasonable and unassailable in judicial proceedings brought by ratepayers." Wegoland Ltd. v. NYNEX Co., 27 F.3d 17, 18 (2d Cir. 1994); see also, Taffet v. Southern Co., 967 F.2d 1483, 1490 (11th Cir. 1992)(en banc)("[T]he filed rate doctrine recognizes that where a legislature has established a scheme for.

. . rate-making, the rights of the rate-payer in regard to the rate he pays are defined by that scheme.").

Pennsylvania law requires that all rates for policies of property and casualty insurance be filed with the Department of Insurance. See 40 PA. CONS. STAT. § 710-5(a)(1999). One purpose of this rate filing requirement is to address the possibility that an insurer might charge "excessive rates". See id. § 710-5(c)(2)(I).

Defendants characterize plaintiff's Complaint as one that alleges that defendants purchased insurance on plaintiff's behalf at "excessive rates". However, the Court cannot conclude that defendants' characterization of plaintiff's Complaint is an accurate one. Upon a review of the facts plaintiff has alleged, it appears to the Court that plaintiff does not challenge the mortgagee purchased, hazard insurance as excessive. Rather, plaintiff alleges that the defendants' decision to purchase mortgagee purchased hazard insurance at a rate that far exceeded the mortgagor purchased hazard insurance without notice to the plaintiff was a breach of the mortgage contract, and was an action taken in violation of defendants' obligation to proceed with good faith and fair dealing.

In support of their Motion, defendants rely upon this Court's decision in Stevens v. Union Planter's Corporation et al., No. Civ. 00-1695, (E.D.Pa. August 20, 2000) to support their

Motion to Dismiss in this case. In that case, the plaintiff[1] argued that the force placed insurance premium defendants charged plaintiff was excessive. Thus, when examining plaintiff's Complaint it was clear that plaintiff challenged the excessiveness of the insurance premiums. However, in this case, plaintiff does not appear to challenge the excessiveness of any one rate of insurance. Instead, plaintiff challenges the way in which the defendants' chose the insurance at issue. Thus, the Court will not dismiss all of plaintiff's claims except his RESPA claim at this time.[2]

Next, defendants seek to dismiss plaintiffs RESPA claims. First, plaintiff claims that defendants' failure to notify Stevens that defendants transferred his mortgage on July 28, 1997 violated 12 U.S.C. § 2605(b)(2)(A).[3] Second, plaintiff claims that when Citigroup did not make timely payments of

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[1]The plaintiff in that case was the same plaintiff as in this case.

[2]While the Court will not dismiss plaintiff's Complaint at this juncture, should it become more clear that plaintiff's merely challenge the excessiveness of the mortgagee placed hazard insurance, the parties may confront this issue again on summary judgment.

[3]12 U.S.C. § 2605(b)(2)(A) provides that:

> Except as provided under subparagraphs (B) and (C), the notice required under paragraph (1) shall be made to the borrower not less than 15 days before the effective date of transfer of the servicing of the mortgage loan (with respect to which such notice is made).

insurance premiums from Stevens' funded escrow account, it violated 12 U.S.C. § 2605 (g)[4].

Defendants contend that plaintiff's RESPA claims fail to plead the existence of actual damages. As this Court has previously held, and other Courts in this district have held, a plaintiff cannot proceed on RESPA claims without alleging some actual damage attributable to defendant's violation of the statute. See Stevens v. Union Planter's Corporation et al., No. Civ. 00-1695, at 10 (E.D.Pa. August 20, 2000); Cortez v. Keystone Bank, Inc., No. 98-2457, 2000 WL 536666, at *1 (E.D.Pa., May 03, 2000). Here, plaintiff fails to explain the damages he incurred flowed directly from defendants' alleged nondisclosure.

Plaintiff moves the Court to grant him leave to amend his Complaint for a second time if the Court finds that he has not pled his RESPA damages with sufficient particularity. A party may amend a "pleading once as a matter of course at any time before a responsive pleading is served...[o]therwise a party may amend the party's pleading only by leave of court."

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[4]12 U.S.C. § 2605(g) provides that:

> If the terms of any federally related mortgage loan require the borrower to make payments to the servicer of the loan for deposit into an escrow account for the purpose of assuring payment of taxes, insurance premiums, and other charges with respect to the property, the servicer shall make payments from the escrow account for such taxes, insurance premiums, and other charges in a timely manner as such payments become due.

FED.R.CIV.P. 15(a). Additionally, "leave shall be freely given when justice so requires." Id. The Third Circuit has explained that "prejudice to the non-moving party is the touchstone for the denial of an amendment." Cornell & Co. v. Occupational Safety & Health Review Comm'n, 573 F.2d 820, 823 (3d Cir. 1978). If no prejudice exists, denial must be based upon bad faith, dilatory motives, truly undue or unexplained delay, repeated failures to cure the deficiency by amendments previously allowed, or futility of amendment. See Heyl & Patterson Int'l, Inc. v. F.D. Rich Housing of the Virgin Islands, Inc., 663 F.2d 419, 425 (3d Cir. 1981), cert. denied, 455 U.S. 1018 (1982).

There is no question that plaintiff knew that he had to plead actual damages under RESPA. Indeed this Court dismissed plaintiff's RESPA's Complaint in Stevens v. Union Planter's Corporation et al., for this very reason, and gave plaintiff fifteen days to properly amend his Complaint in that case. See Stevens v. Union Planter's Corporation et al., No. Civ. 00-1695, at 10 (E.D.Pa. August 20, 2000). Plaintiff never amended his Complaint, and this Court subsequently dismissed plaintiff's Complaint. Here, after defendants' originally moved to dismiss plaintiff's Complaint on September 25, 2000, plaintiff amended his Complaint instead of answering defendants' motion. Defendants made the same "actual damages" argument in their September 25, 2000 motion, but plaintiff seemingly ignored

defendants' argument, and this Court's prior holdings, yet now seeks to amend his Complaint for a second time. Under the circumstances, the Court will not permit plaintiff to amend his Complaint to cure his RESPA claims.

Defendants further seek to dismiss plaintiff's claims against Citigroup and Citicorp because they argue plaintiff's Complaint does not allege facts to support piercing the corporate veil of Citimortgage. Plaintiff does not respond to this portion of defendants motion.

Generally, courts recognize and uphold the corporate entity unless specific, unusual circumstances call for an exception. See Arch v. American Tobacco Co., Inc., 984 F. Supp. 830, 839 (E.D.Pa. 1997). To warrant piercing the veil, a plaintiff must demonstrate "complete domination, not only of finances but of policy and business practice in respect to the transaction attacked so that the corporate entity as to this transaction had at the time no separate mind, will or existence of its own." Craig v. Lake Asbestos of Quebec, Ltd., 843 F.2d 145, 150 (3d Cir. 1988). The factors that must be considered to determine if the corporate veil should be pierced include: gross undercapitalization, failure to observe corporate formalities, non-payment of dividends, siphoning of funds of the corporation by the dominant stockholder, non-functioning of other officers or directors, absence of corporate records, and the fact that the

corporation is merely a facade. See id. (citing American Bell Inc. v. Federation of Telephone Workers, 736 F.2d 879, 886 (3d Cir. 1984)).

As defendants correctly note, plaintiff does not allege any of the above factors in his Complaint. Instead, plaintiff merely claims that:

> CITIGROUP exercises full dominion and control over CITICORP AND CITIMORTGAGE, INC., with common officers, directors and integrated operations over the activities of the various "segments" and "units", including, but not limited to, the mortgage financing and servicing divisions of CITIGROUP.

Accordingly, after reviewing plaintiff's Complaint, the relevant law, and defendants' contention that plaintiff's Complaint fails to allege sufficient fact to pierce the corporate veil, this Court shall dismiss plaintiff's claims against Citigroup and Citicorp.[5]

Finally, defendants argue that plaintiff's claim of fraud should be dismissed because those allegations do not satisfy Federal Rule of Civil Procedure 9(b), which provides:

> In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity.

FED.R.CIV.P. 9(b). Rule 9(b) requires a plaintiff to plead (1) a specific false representation of material fact; (2) knowledge by

[5]Moreover, because plaintiff failed to timely respond to this portion of defendants' motion, the Court further grants defendants motion to dismiss Citigroup and Citicorp as uncontested pursuant to Local Rule of Civil Procedure 7.1.

the person who made it of its falsity; (3) ignorance of its falsity by the person to whom it was made; (4) the intention that it should be acted upon; and (5) that the plaintiff acted upon it to his damage. See Shapiro v. UJB Financial Corp., 964 F.2d 272, 284 (3d Cir. 1992) (citing Christidis v. First Pennsylvania Mortgage Trust, 717 F.2d 96, 99 (3d Cir. 1983).

Plaintiff apparently concedes, and this Court finds, that his Complaint does not set forth the elements of fraud with sufficient particularity. Instead, plaintiff requests that the Court grant him leave to amend his Complaint to clarify his fraud claim. Unlike plaintiff's request to amend his RESPA claim, this Court has not previously dismissed one of plaintiff's Complaints for failing to plead fraud with particularity. Nonetheless, the fact remains that plaintiff has already amended his Complaint once in the face of a motion to dismiss plaintiff's fraud allegations. Because plaintiff has already amended his Complaint in response to defendants' motion to dismiss plaintiff's fraud allegations, plaintiff's attempt to now admit his Complaint is still deficient and to amend his Complaint for a second time, is unwarranted. Thus, the Court will dismiss plaintiff's fraud claims, and deny plaintiff leave to amend his fraud claims.

B. Defendants' Motion to Dismiss All Class Allegations

Defendants also move the Court to dismiss plaintiff's

class allegations because plaintiff has not yet filed a motion to certify a class, nor has plaintiff moved for more time to file a motion to certify a class.

Pursuant to Federal Rule of Civil Procedure 23(c)(1):

> As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

FED.R.CIV.P. 23(c)(1).

In accordance with the Federal Rules of Civil Procedure, this District's Local Rules of Civil Procedure provide:

> Within ninety (90) days after the filing of a complaint in a class action, unless this period is extended on motion for good cause appearing, the plaintiff shall move for a determination under subdivision (c)(1) of Fed.R.Civ.P. 23, as to whether the case is to be maintained as a class action.

LOC.R.CIV.P. 23.1 (c).

Defendants argue that because Stevens filed his Complaint on July 27, 2000, his motion to certify a class was due by October 25, 2000. Thus, defendants claim that Stevens class allegations should be dismissed as untimely.

As plaintiff correctly notes, numerous courts have held that failure to comply with the Local Rule in and of itself does not constitute grounds for denying a motion to certify a class action. See McHenry v. Bell Atlantic Corp., NO. CIV. A. 97-6556,

1998 WL 512942, at *8 (E.D.Pa., Aug 19, 1998); Robert Alan Insurance Agency v. Girard Bank, 107 F.R.D. 271, 274 (E.D.Pa.1985); Pabon v. McIntosh, 546 F. Supp. 1328, 1331-32 (E.D.Pa. 1982); Muth v. Dechert, Price & Rhoads, 70 F.R.D. 602, 606 (E.D.Pa. 1976). Instead, there must also be a showing of prejudice to the defendants or members of the class. See Herskowitz v. Nutri/System, Inc., 1986 WL 13546, at * 2 (E.D.Pa., Dec 02, 1986); Muth, 70 F.R.D. at 606.

Here, defendants have not demonstrated any prejudice to themselves or to the class members. Indeed, defendants have not even filed an answer in response to plaintiff's Complaint. Plaintiff filed its Amended Complaint on October 26, 2000 pursuant to Federal Rule of Civil Procedure 15(a). Thus, arguably, plaintiff has until about January 26, 2000 to certify his case as a class action.

Next, the Court finds defendants' argument——that plaintiff's counsel is inadequate as class counsel——unpersuasive.

C. Defendants' Motion for Award of Attorney's Fees and Costs

Defendants' final motion is for an award of attorney's fees and costs incurred in moving to dismiss plaintiff's Complaint pursuant to 28 U.S.C. § 1927, which provides:

> Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses,

> and attorneys' fees reasonably incurred because of such conduct.

28 U.S.C. § 1927 (West 2000).

Under that section, a finding of willful bad faith on the part of the offending lawyer is a prerequisite for imposing attorney's fees. See Williams v. Giant Eagle Markets, Inc., 883 F.2d 1184, 1190 (3d Cir. 1989); Fair Housing Council of Suburban Philadelphia v. Montgomery Newspapers, NO. CIV.A. 96-1381, 1997 WL 185935, at *5 (E.D.Pa. Apr 09, 1997). In this case, and especially because the Court has not dismissed plaintiff's Complaint in its entirety, the Court does not find that plaintiff's counsel has acted in willful bad faith. Consequently, the Court will not grant defendants' Motion for Attorney's Fees.

An appropriate Order will follow.

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Clarence C. Newcomer, S.J.